FARLAND SIRIN

v.

MOSBERT BHD.

HIGH COURT MALAYA, JOHOR BAHRU
MAHADEV SHANKAR J
[ORIGINATING SUMMONS NO. 320 OF 1983]
19 MARCH 1984

CIVIL PROCEDURE: *Application for leave to initiate proceedings.*

LAND LAW: *Private caveat - Whether should be removed.*

On 7 Feburary 1984 judgment was delivered in originating summons No. 319 of 1983. The plaintiff was Chatib bin Kari. The order and judgment in that case was the subject of an appeal which was pending in the Federal Court. The issues in that case were for all practical purposes the same as those in the case before the Court, except that the plaintiff was different. At the outset the defendant applied for leave to cross-examine the plaintiff on his affidavits.

Held :

[1] The application to cross-examine on the affidavits must be refused. The established practice ordering cross-examination on interlocutory affidavits is discretionary and such cross-examination is very rarely granted. (Reference made to passage in the *Supreme Court Practice* 1979).

[2] The caveat must remain until the final disposal of the suit filed by the plaintiff. Whether a caveat should remain depends on whether the plaintiff's claim to an interest in the property raises a serious question to be tried and whether on the balance of convenience it would be better to maintain the *status quo* until the trial of the action by preventing the registered owner from disposing of the land to a third party. The plaintiff had discharged the burden of proof by proving the right to continue the caveat. He had raised very serious questions to be tried and had shown that the *status quo* must be maintained until the determination of the trial of the action. Further, where there is conflict of testimony, the caveat will not be discharged.

[3] Leave must be granted to the plaintiff to initiate the necessary proceedings against the defendant.

Cases referred to:
Eng Mee Yong v. Letchumanan Chettiar [1979] 2 MLJ 212
Jit Kaur v. Parl Singh [1974] 2 MLJ 199
Macon Engineering Sdn. Bhd. v. Goh Hooi Yin [1976] 2 MLJ 53

For the plaintiff - Julie Lim; M/s. H.H. Long & Co.
For the defendant - C.K.G. Pillay; M/s. Hassan Yunos & Co.

Other source referred to:
Supreme Court Practice 1979, para. 38/2/4 at p. 592

JUDGMENT

Mahadev Shankar J:

On 7 February 1984 I delivered judgment in Originating Summons 319 of 1983. The plaintiff there was Chatib bin Kari. Here the plaintiff is Farland @ Firlan bin Sirin (Farland). He claims to have purchased Private Lot No. 62 in Taman Chandrakaseh Phase 1. Apart from this, the issues in both cases are for all practical purposes the same.

The order and the Judgment which I have given in that case is now the subject of an appeal which is pending in the Federal Court.

Yet, rather than await the outcome of that appeal the defendant has required this originating summons to be proceeded with and it accordingly came on for disposal on 4 March 1984.

At the outset Counsel for the defendant applied for leave to cross-examine the plaintiff on his affidavits.

This cross-examination was intended to show that the plaintiff could not have gone into possession. Also that it could not be true that Jet Age had full knowledge that the said land had been sold by the company to various purchasers and that Farland was one of them.

Counsel for the defendant did not cite the rule under which the application was being made, or any authorities relating to the principles upon which such an application should be granted.

Miss Lim for the plaintiff objected to the application on the ground that it would be tantamount to re-opening an affidavit which was the basis of a consent order. She submitted that the application to set that order aside was impermissible as the issues pertained to the main trial.

After I invited attention of Counsel for the defendant to the passage appearing in the *Supreme Court Practice* 1979 para. 38/2/4 at p. 592 which I take it sets out the established practice that ordering cross-examination on interlocutory affidavits is discretionary and very rarely granted, he did not pursue the matter further.

It did not seem to have occurred to the defence that their application would have resulted in a trial of the very issues of fact which they were seeking to prevent the plaintiff from ventilating by objecting to his application for leave.

I refused the application.

After a reconsideration of his position Counsel for the defendant stated that he was not objecting to Farland's first prayer in this originating summons.

Thus the Court was left only with the issue as to whether the caveat which Farland had filed should be allowed to remain until the disposal of his action.

Mr. Pillay says no. He says that when the caveat was filed the defendant no longer had any interest in the land for the plaintiff to caveat since the defendant had totally parted with its rights to the land by receiving the purchase money in full from Jet Age and even handing over the document of title to them.

Mr. Pillay contends that upon the purported sale by the Liquidator the company merely became a bare trustee on behalf of Jet Age. But the sale to the plaintiff was prior in point of time. Mosbert Berhad was therefore trustee for Farland, if that sale was good. By a purported sale of the very same land to Jet Age, the Liquidator could not become a trustee of something he, in equity never had.

The defendant company had paid the balance of the purchase price and received the title on 29 March 1982. But the plaintiff only filed his caveat on 7 October 1982. It was urged therefore that his caveat should not stand as Jet Age had no knowledge whatsoever of Farland's interest in the land and therefore cannot be made to suffer the consequences of this caveat.

But the agreement signed on 1 April 1981 between the Official Liquidator and Jet Age specifically referred to a number of individual purchasers some of whom filed caveats on the said land. In other words there were other purchasers who had not. Again in the same agreement Jet Age had undertaken the responsibility "to negotiate and settle with **all the individual purchasers of the said land** and other persons who had caveated the said land and for these purposes take such Court proceedings as may be necessary."

This evidence does suggest that even though Jet Age may not have known of the precise identity of every individual purchaser, when they signed the agreement, they knew there was a class of people who had bought individual lots and had cognizance of their interest in the land.

In law, the continuation of the caveat does not depend solely upon whether Jet Age had actual or constructive knowledge of when they contracted to buy the land. In my previous judgment I have already held that *Eng Mee Yong v. Letchumanan Chettiar* [1979] 2 MLJ 212, decided that whether a caveat should remain depends upon whether the plaintiff's claim to an interest in the property raises a serious question to be tried and whether on the balance of convenience it would be better to maintain the *status quo* until the trial of the action by preventing the registered owner from disposing of the land to some third party.

Like Chatib, Farland has raised very serious questions to be tried. As for the balance of convenience the agreement between Jet Age and the Liquidator is enough evidence of an attempted disposal of the land which the plaintiff claims. Accordingly the *status quo* must remain until the trial of the action.

Mr. Pillay says that the burden of proof of the right to continue the caveat is on the person who lodges the caveat. That burden has been discharged in this case. I would add a rider that it remains to be investigated at some appropriate time whether the onus is not equally shared where the contest is not between the caveator and the registered owner but some third party who like the caveator also claims to have bought the property, with or without notice.

Another point raised by the defence is that Private Lot 62 is incapable of physical identification on the ground and that Farland's caveat was therefore void for uncertainty. The plan attached to the said Agreement was drawn by a licensed surveyor and I am not prepared to make such a finding on the mere say-so of defence Counsel in the absence of further evidence.

In the last analysis the over-riding principle in such an application seems to be that which was articulated by S.K. Das, cited with approval in *Jit Kaur v.Parl Singh* [1974] 2 MLJ 199 at 201 and again in *Macon Engineering Sdn. Bhd. v. Goh Hooi Yin* [1976] 2 MLJ 53 at 58. The passage reads:

> In dealing with applications for the extension of the operation of or for the removal of caveats against dealings with land it has always been the desire of the Court to allow the parties the fullest opportunity to litigate any matter that may be in dispute between them. The Court is loth to prevent parties litigating any right that they think they may possess: In *re Caveat of Lewis* [1903] 23 NSLR SC 581. Where there is a conflict of testimony the caveat will not be discharged.

It may better serve the interests both of justice and expediency if this case and the others connected with it are consolidated and proceeded with but until the appeal in Chatib's case is heard an early trial is not a luxury open to us. In all the circumstances I ordered that leave be granted to Farland in terms of the first prayer in this originating summons to initiate the necessary legal proceedings against the defendant and that the suit against the company be filed within 4 weeks from 4 March 1984 but that after the filing and service of the proceedings all further proceedings be stayed until the disposal of the appeal in OS 319 of 1983.

The caveat in this case will remain until the final disposal of the suit to be filed by the plaintiff and the plaintiff will also have an Order in Terms of the second, third and fourth prayers in his originating summons.

It follows from this that the summons-in-chambers of the defendant dated 2 November 1983 is dismissed and the costs of and incidental thereto shall be taxed and paid by the defendant to the plaintiff but the costs of the originating summons, the affidavit in support thereto, and the consent order of this Court made on 7 September 1983 are reserved and shall be dealt with in the action to be filed by the plaintiff pursuant to the leave hereby granted.

Also found at [1984] 2 CLJ 236